

# IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

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## COMPLETE TITLE OF CASE

STATE OF MISSOURI,

Respondent,

v.

JASON L. BERRY,

Appellant.

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**DOCKET NUMBER WD78753**

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**DATE:** October 11, 2016

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## APPEAL FROM

The Circuit Court of Jackson County, Missouri  
The Honorable Kevin D. Harrell, Judge

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## JUDGES

Division IV: Pfeiffer, C.J., and Welsh and Ahuja, JJ.

CONCURRING.

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## ATTORNEYS

Chris Koster, Attorney General  
Karen L. Kramer, Assistant Attorney General  
Jefferson City, MO

Attorneys for Respondent,

Damien de Loyola, Assistant Appellate Defender  
Kansas City, MO

Attorney for Appellant.

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## MISSOURI APPELLATE COURT OPINION SUMMARY

### MISSOURI COURT OF APPEALS, WESTERN DISTRICT

STATE OF MISSOURI, )  
)  
Respondent, )  
v. ) **OPINION FILED:**  
) **October 11, 2016**  
JASON L. BERRY, )  
)  
Appellant. )

**WD78753**

**Jackson County**

**Before Division IV Judges:** Mark D. Pfeiffer, Chief Judge, and James Edward Welsh and Alok Ahuja, Judges

Mr. Jason Berry ("Berry") appeals from his convictions for burglary in the first degree, rape in the first degree, and sexual abuse in the first degree, following a jury trial in the Circuit Court of Jackson County, Missouri ("trial court"). Berry claims the trial court plainly erred in instructing the jury and in sentencing.

Specifically, Berry contends: (1) the verdict directing instruction for sexual abuse conflicts with the substantive law because it failed to require the jury to find one of the essential elements of the crime: that the victim was a woman; (2) he was denied his due process right to be personally present at resentencing: the trial court *orally* pronounced a thirty-year sentence on the first-degree sexual abuse count, but the *written* judgment reflected a fifteen-year term of imprisonment; the trial court granted the State's motion to correct the sentence on the first-degree sexual abuse charge by order *nunc pro tunc* and resentenced Berry to fifteen years' imprisonment; and (3) his sentence of thirty years' imprisonment on the first-degree burglary count was based on the trial court's misunderstanding as to the range of punishment.

**AFFIRMED IN PART; VACATED IN PART AND REMANDED.**

**Division IV holds:**

1. The verdict directing instruction for sexual abuse complied with the pattern instruction, and the evidence establishing the allegedly “omitted element” of the victim’s sex was not seriously disputed.

2. Berry was denied his due process right to be personally present at resentencing. If the oral pronouncement of sentence contains a discrepancy, the trial court can correct the discrepancy before it is reduced to writing only if the defendant is present. If the defendant is not returned for resentencing, the trial court has authority only to enter the sentence as orally pronounced. A defendant has a due process right to be personally present at sentencing and to be heard on the pronouncement.

3. Berry was lawfully sentenced upon conviction as a prior and persistent offender for first-degree burglary to thirty years’ imprisonment, which is within the statutorily-authorized maximum term of imprisonment for a class A felony.

4. Berry’s convictions are affirmed; his sentence on the first-degree sexual abuse count is vacated, and the cause is remanded for resentencing as to that count only.

**Opinion by: Mark D. Pfeiffer, Chief Judge**

October 11, 2016

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